U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date: April 22, 1999

Case No.: 1996-INA-0017

In the Matter of:

ATHINA TZANIDES,
Employer

On Behalf Of:

HELENA PRZECHRZTA,
Alien

Certifying Officer: Dolores Dehaan, Region II

Appearance: Peter J. Lorme, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 12, 1994, Athina Tzanides ("Employer") filed an application for labor certification to enable Helena Przechrtza ("Alien") to fill the position of Domestic Cook (AF 6). The job duties for the position are:

> Plan/cook/serve Greek style meals in private home for elderly couple. Prepare all ingredients and spices and cook dishes including stefatho, mousaka, pastitsio, dolmades, gouvetse, fish soup. Bake breads, pastries and cakes. Clean kitchen and all cooking equipment.
>
> The requirements for the position are two years of experience in the job offered.

The CO issued a Notice of Findings on May 10, 1995 (AF 32-35), proposing to deny certification on the grounds that it does not appear that the duties of the position constitute full-time employment in violation of 20 C.F.R. § 656.50 (recodified as § 656.3). To establish rebuttal, the Employer was notified it must provide specific documentation that the position constitutes full-time employment. The CO also found that the Employer rejected U.S. applicant Steve Tunias for other than lawful, job-related reasons, in violation of § 656.24 (b)(2)(ii) and § 656.21(b)(6). The Employer was notified that it must establish that this U.S. worker, by his education, training, experience, or a combination thereof, is unable to perform in a normally accepted manner the duties involved in this position as normally performed by other U.S. workers similarly employed. Employer was given notice that it had until June 14, 1995, to submit rebuttal to the CO's findings.

In its rebuttal, dated June 14, 1995 (AF 36-51), the Employer contended that the position was full time based on the fact that the household consists of a physician and a full-time school teacher, who also assists her husband at his office, no other workers are employed and household duties are performed by the couple on weekends, no domestic cooks have been employed in the past, the couple has cooked for themselves or eaten in restaurants previously, there are no children in the household, and the Alien was selected because no qualified U.S. workers could be found (AF 47-49). Regarding applicant Tunias, the Employer stated that she asked him if he was "either a U.S. citizen, a U.S. national, a legal permanent resident of the U.S., or a refugee in

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

the U.S. Mr. Tunias states that he was in none of the foregoing classes." Thus, the Employer contends that even if she wanted to, she could not have hired Mr. Tunias pursuant to § 656.3. The Employer also contended that Mr. Tunias was not qualified for the position, as he had no experience as a domestic cook and his only experience was running his own restaurant in Greece.

The CO issued the Final Determination on June 21, 1995 (AF 52-54), denying certification because the Employer had failed to adequately document that the position is full time, in violation of § 656.50 (recodified as § 656.3), and it appears that the position was created solely for the purpose of qualifying the Alien for a visa as a skilled worker. The CO noted that the Employer had sufficiently rebutted the issues regarding U.S. applicant Steve Tunias.

On July 26, 1995, the Employer requested review of the denial of labor certification (AF 55-65). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

This matter falls squarely within our holding in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). Therefore, we hold as stated in *Uy* that:

> In view of the lack of clarity of the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a *bona fide* job opportunity for a Domestic Cook. The CO shall then consider the existing record and any supplemental documentation submitted by Employer, and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Carlos Uy at 16.

ORDER

The Certifying Officer's denial of labor certification is **VACATED**, and this matter is **REMANDED** for consideration in light of our decision in *Carlos Uy*.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.